No. 3154.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION LAND AND STOCK COMPANY, a Corporation,

Appellant.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

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STATEMENT OF FACTS.

This is an action in equity by Appellee to have declared forfeited a right of way and easement for a reservoir for the storage of water, involving certain lands in Lassen County, California, the right being claimed by Appellant under the provisions of the Act of Congress of March 3, 1891, Chapter 561, (26 Stat. 1101) entitled "An act to Repeal Timber Culture Laws, and for Other Purposes. (Trans. pp. 3, 4, 5, 6.)

In the year 1894 Appellant entered upon the lands involved and commenced the construction of a reser-

voir, which it finished in 1895 to a height of 35 feet, at which height it remained until the winter of 1897-8, when it was partially washed out, being reconstructed in the fall of 1898 to a height of 26 feet, from which it settled to a height of 23 feet at its lowest point, at which height it has ever since remained. It is equipped with 300 feet of 30 inch pipe through the bottom, with patent gate to store and withdraw water. The dam as constructed being capable of storing water over approximately 100 acres of land, having a capacity of not to exceed 600 acre feet of water; the dam being strong enough to store water in the reservoir to a depth of 20 feet. This reservoir is one of a series of reservoirs, the others being Nos. 2 and 3, they all being used in connection with each other, Reservoir No. 1, the one in suit, having been mainly used for the irrigation of what is known as the "Moulton Ranch."

(Stipulation re construction work on reservoir, etc., Tr. pp. 10 and 11.)

The reservoir has been used to store water each year since its construction, with the exception of dry years when there was no water to store. (Tr. p. 11.)

In February, 1895, Appellant filed with the Secretary of the Interior, through the United States Land Office at Susanville, California, its Articles of Incorporation, together with due proofs of its organization. (Tr. p. 11.) This was filed by Appellant in connection with an application for an ease-

ment for a reservoir for irrigation purposes, under the provisions of the Act hereinbefore referred to, (Tr. p. 4), a copy of the map accompanying said application being attached to the complaint in this action, marked Exhibit A. (Tr. p. 11.)

The map accompanying the application contemplated a reservoir site covering approximately 469 acres, with a dam at the outlet thereof, at the same point where the dam in controversy was constructed, 50 feet high, with a width base of 270 feet, a length on top of 230 feet and a length base of 80 feet, calculated to store, when completed, water over the entire acreage of said reservoir as contemplated by said map. (Tr. pp. 5, 6, 7.)

The bill of complaint averred that the plaintiff was the owner in fee simple of the entire reservoir site (Tr. p. 4), which averment was denied by the answer, Appellant affirmatively claiming ownership of 240 acres of the land in fee simple (Tr. p. 8). No proof was offered by Appellee at the trial as to its ownership.

The only averment by the plaintiff as to a breach of its obligations on the part of the Appellant under the grant was "that no part of said reservoir or section thereof has been constructed since the approval of said right of way by the Secretary of the Interior." (Tr. p. 5.)

The Appellant moved the Court to dismiss the bill of complaint upon the grounds that it did not state facts sufficient to constitute a valid cause of

action in equity, (Tr. pp. 6 and 7), which motion was denied (Tr. p. 7).

Judgment was for the plaintiff, Appellee herein, forfeiting all adverse claims of Appellant to said grant to said lands covered by the easement and rights of way, and estopping Appellant from asserting any right, title or interest in said land, easement and rights of way, and reinvesting in Appellee all title, rights and interest in said property and declaring said grant null and void (Tr. p. 2).

The above embodies all the facts and issues in the case, and through the courtesy of Appellee's counsel we are able to present it in a comparatively brief form.

ASSIGNMENTS OF ERROR.

Appellant assigns the following as error:

1. The Court erred in refusing to dismiss the bill of complaint, because of the failure of said bill to state facts sufficient to constitute a valid cause of action in equity, this being apparent from the following:

a. There was no averment in the bill of complaint that the defendant had not complied with the terms of the grant, but only that no construction or completion had been accomplished "since the approval of said right of way by the Secretary of the Interior," thus leaving the presumption that the construction and completion had been accomplished before said approval, and that the Appellant had fully complied with the terms of the grant.

b. The action for forfeiture has never been authorized by the Congress of the United States, and hence the Attorney General of the United States has no authority to prosecute it and the Court has no power to entertain it, which defect appears on the face of the bill of complaint.

2. The decree is erroneous and unjust to this defendant, Appellant herein, because there is no authority in law for the prosecution of this action.

3. The Court erred in holding all of the rights of Appellant in the reservoir site involved in this action for cancellation for the following reasons:

a. There is no law declaring a forfeiture of said reservoir rights, except to the extent that said reservoir has not been completed, and the stipulated facts in said case show that said reservoir has been completed to a height of 23 feet, within 5 years after the approval of said application of the Appellant by the Secretary of the Interior, and that ever since said completion water has been stored in said reservoir each year and devoted to a beneficial purpose, viz.: irrigation, and the law gives defendant, Appellant herein, an indefeasible title and right to said reservoir to the height of 23 feet.

b. It appears as an undisputed fact that in the years 1894 and 1895 the Appellant constructed a dam at said reservoir site to a height of 23 feet, the same storing water in said reservoir over approximately 100 acres of land and having a capacity of 600 acre feet of water, and has ever since maintained and used the same for a beneficial purpose; that in the

month of February, 1895, Appellant filed in the office of the Secretary of the Interior for the United States of America, its Articles of Incorporation and due proofs of its organization; that by reason of the foregoing Appellant's title to the right of way for said reservoir became vested to the extent of said construction, and said Court had no power to forfeit the rights of Appellant in or to said reservoir as constructed.

c. The decree purports to forfeit the rights of Appellant not only to said reservoir site, but also as to all lands embodied within the limits thereof, while it appears as an undisputed fact that the Appellant holds fee simple title 240 acres of the lands within the limits of said reservoir site, independent or said right of way.

ARGUMENT.

THE BILL OF COMPLAINT SHOULD HAVE BEEN DISMISSED.

1. Because it presented no issuable fact warranting the interposition of a Court of Equity.

Being a pleading in equity it devolved upon the plaintiff by proper averment to show its right and title to the relief sought, which must have been based on some breach of legal or moral duty on the part of defendant.

Harrison vs. Nixon, 9 Pet. 483.

No breach of duty on the part of the defendant can be inferred from the bill of complaint.

After averring the facts relative to the filing of an application for a right of way for the reservoir in question we find that the only averment as to any failure by defendant to construct the reservoir in accordance with the map filed as part of the application, related entirely to a period after the approval of the application by the Secretary of the Interior.

So far as can be gathered from the averments of the bill the reservoir was fully constructed before such approval.

The averment as to the breach of the defendant is as follows:

"That no part of said reservoir or section thereof has been constructed or completed by said defendant or its agents since the approval of said right of way by the Secretary of the Interior." (Tr. p. 5.)

As will be shown by the authorities hereinafter cited the rights of the defendant do not depend upon the approval of said right of way by the Secretary of the Interior, except as relating to the question of preferred right pending construction.

It would have been perfectly legal and proper for the defendant to have entered on the lands embraced within said reservoir site and constructed the dam in accordance with said plans, or in accordance with its best ideas of convenience and utility, without reference to any application to the Secretary of the Interior at all, provided only that it should either before or after such construction file its articles of incorporation and due proofs of its organization with the Secretary of the Interior.

Act of Congress of March 3, 1891, Chap. 561 (26 Stat. 1101.) Sec. 18.

Assuming that the rights of the defendant depended solely upon the filing of an application, we respectfully submit that all the requirements of equity would be fully met by the construction of the reservoir in accordance with the application before its approval by the Secretary of the Interior, as this would certainly accomplish the purposes of the law.

2. Being purely an action for a forfeiture not authorized by law, a Court of Equity cannot entertain it.

Marshall vs. Vicksburg, 15 Wall. 146-149.
Horsburg vs. Baker, 1 Pet. 232-236.

3. Because there is no authority for the prosecution of this action.

The Act above cited gives no such authority and Congress by separate enactment or resolution has never sought to give it.

This precise question has been passed on several times by the United States Supreme Court and by the Circuit Court of Appeals, and we only find one case which attempts to give a contrary doctrine.

In support of our position we cite:

United States vs. Washington Imp. Co., 189 Fed. 674.

In the above case the forfeiture sought related to a land grant, which in principle is no different from the grant of the easement involved here, and it was

there held that no suit in equity to forfeit a land grant could be maintained for the breach of a condition subsequent, in the absence of a declaration of forfeiture by Congress, or express authority from Congress for the institution of such proceeding.

There, as here, the Act granting the right provided that unless certain work was performed within a certain time the rights granted "shall be forfeited."

That the above case was well considered is apparent from an inspection. It is far too voluminous to be quoted in full, and as every line and every authority cited is pertinent to the question here involved, we confidently rest this feature of our case on that decision, particularly calling the attention of this Honorable Court to that portion of the decision appearing on page 680 and following, both as bearing on the question of lack of authority for the maintenance of this action, and the right of a Court of Equity to entertain it.

The decision also takes up and discusses the case of United States vs. Whitney (C. C.) 176 Fed. 593, which is the only case we have been able to find stating a contrary rule. The Washington Improvement Company case is a later and far better analyzed case than the Whitney case, and we respectfully submit, states the only rule supported by reason.

The above points cover our 2d assignment of error, and we submit them as covering said assignment, without repetition.

THERE WAS NO AUTHORITY IN LAW OR EQUITY FOR THE COURT TO HOLD ALL THE APPELLANT'S RIGHTS FOR CANCELLATION.

The rights of the Appellant and the authority of the Court are covered by the provisions of the Act of Congress of March 3, 1891, above cited, being embodied in Sections 18, 19 and 20 of said Act (26 Stat. 1101).

The only provision for forfeiture is contained in the proviso to Section 20 and reads as follows:

"*PROVIDED.* That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture."

It will be seen that this proviso expressly limits the forfeiture to that portion of the uncompleted section of the reservoir that has not been completed within five years "from the location of the reservoir."

The location referred to in the Act, as we shall presently show, may be manifested either by construction of the works, or by filing the application provided for by the Act.

There is no uncertainty in the terms of the proviso. It is as plain as the English language can make it. Assuming that there was any authority for this pro-

ceeding at all, the Court would be limited in its judgment to declaring a forfeiture of that portion of the reservoir which had not been utilized.

And properly so.

Take the facts of the instant case: The Appellant constructed a feasible dam, capable of storing water over 100 acres of land, having a capacity of 600 acre feet of water, and put this dam to a useful purpose for over 20 years (Tr. p. 10-11).

This reservoir was one of a series of reservoirs, all of them being used together in one enterprise, and presumably a valuable and useful one (Tr. pp. 10-11).

There is not an intimation in the record or the evidence that the dam could have been used practically at a greater height than 23 feet, or that there was sufficient water to have fillled a larger reservoir at this point, other than the figures on the map showing a contemplated ultimate height of 50 feet.

There is nothing except this map on which to base a surmise that the Appellant has not utilized the reservoir site to its fullest practical capacity.

The absence of any showing by the plaintiff on this point entitles the Appellant to the presumption that these facts exist, and as a matter of fact they do exist. Under no rule of law or evidence can it be said that the Appellant had the burden of showing utility until it was first established, prima facie at least, that any larger reservoir than that constructed would be practical or useful.

We submit that there is no justice or equity in

the position of the Government in this case, without regard to the question of the power of the Courts or authority to maintain the action.

This is presumptively a suit in equity and we submit that the record shows every equity to be with the Appellant.

Bearing further on the lack of power of the Court to render the decree rendered in this case, we call particular attention to the provisions of Section 18 of the Act above cited, which we herewith set so far as it bears on the question of the vested rights of Appellant:

"Sec. 18. That the right of way through the public lands of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed or shall hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof," etc.

It will be noted that this language passes a present grant from the United States Government to any irrigation company which shall file its articles of incorporation with proofs of its organization with the Secretary of the Interior "to the extent of the ground covered by the water of its reservoir, and fifty feet on each side of the marginal limits thereof."

The articles of incorporation of Appellant, with the proofs of its organization were filed with the Secretary of the Interior in February, 1895, while the reservoir in question was under construction (Tr. p. 11).

From this it follows as a matter of law that the title to the reservoir site to the extent that it was constructed became vested immediately on the filing of the above showing.

The learned Judge who tried this case took the view that no rights passed to the Appellant except by virtue of the application filed by the Appellant in February, 1895, as averred in the bill of complaint, and which application is covered by the provisions of Section 19 of said Act.

That the Court was in error in this view is perfectly apparent from the fact that Section 19 of the Act deals entirely with the question of reserved rights, and provides that when the maps and plans have been approved the location shall be noted on the plats of the Land Office having jurisdiction of the lands involved and that "thereafter such lands shall be disposed of subject to such rights of way."

The Act in question is identical in language with the Act of March 3, 1875, relating to rights of way for railroads, and the precise question here involved has been passed on by the Supreme Court of the United States and by the Land Department in many cases, each holding that a right of way may be located by the construction of the railroad as well as by filing maps and applications. That the Act is a

grant *in presenti* to any railroad that files its articles of incorporation with proofs of its organization and builds the road or files the map.

Jamestown, etc. R. R. vs. Jones, 177 U. S. 125.
Dakota R. Co. vs. Downey, 8 L. D. 115.
St. Paul, etc. R. Co. vs. Maloney, 24 L. D. 460.
Stalker vs. Oregon Short Line, 225 U. S. 142.

The opinion written by Justice McKenna in the case first above cited is determinative of the case at bar on this question. It is no longer an open question; it has become a fixed principle as shown by the authorities without deviation.

The only difference between the two Acts is the substitution of "Railroad," for "Canals, ditches and reservoirs," and the principles surrounding the two Acts are identical.

And we repeat that when the Appellant constructed its dam to a height of 23 feet and filed its articles of incorporation and due proofs of its organization with the Secretary of the Interior, its right to that portion of the reservoir so constructed measured by the land covered by water therein with 50 feet on each side for margin, became vested beyond the power of any Court to take away.

Under the guise of equity the express provisions of the law cannot be made nugatory, especially where there is no equity to support the judgment.

We respectfully ask that the decree be reversed and the District Court be directed to dismiss the bill of complaint, or in the event that this Honorable

Court should determine that the action can be maintained, it direct the District Court to so modify its decree that the forfeiture be limited to that portion of the right of way for said reservoir that has not been utilized, and that Appellant's rights be made absolute to that portion of the reservoir that has been constructed.

Respectfully submitted,

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